145 (3)

No. 08-1575

Supreme Court, U.S.
FILED
NOV 10 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JASON LANDIS LINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

JUSTIN S. ANTONIPILLAI
Counsel of Record
VICTOR A. RORTVEDT
ARNOLD & PORTER, LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

Attorneys for Petitioner

220363

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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In the published, precedential decision issued in this case, the court of appeals announced a procedural rule (the "Litigation Bar") that, for a significant number of future petitioners, will bar access to federal collateral relief. As the Government's Brief in Opposition implicitly concedes (Opp. at 8, 12), the Litigation Bar is in fact a new rule that is without precedent in any other court. This Court should grant a writ of certiorari to review this new Litigation Bar because, among other things, the Litigation Bar appears to conflict with myriad decisions from this Court and with decisions from the other courts of appeals, and because the Litigation Bar implicates this Court's supervisory power. This case also presents a strong vehicle to decide whether the holdings of *Day v. McDonough*, 547 U.S. 198 (2006), apply to petitions filed under 28 U.S.C. § 2255 ("§ 2255"). As is clear from the Government's Opposition, both of these issues are preserved and ripe for review, and there are no jurisdictional, mootness, or other issues that would impede review by this Court.

The Government's Opposition spends little time addressing the conflicts between the holding in this case (on one hand) and the holdings in prior decisions from this Court and from the other courts of appeals (on the other hand), or the importance of resolving them. Rather, the Opposition largely avoids discussion of the conflicts through unnatural characterizations of the court of appeals' decision. As discussed below, the natural and reasonable reading of the court of appeals' decision makes clear the importance of the holding and the conflicts engendered thereby.

For these reasons, and the others discussed below, this Court should grant a writ of certiorari.

I. The Fourth Circuit's Decision Conflicts With This Court's Precedents And With Decisions Of The Other Courts Of Appeals.

With respect to the new Litigation Bar, a writ of certiorari is justified here for several reasons:

(1) An apparent conflict between a decision of a court of appeals and this Court's precedents provides a strong basis for a writ of certiorari. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (certiorari granted "to resolve an apparent conflict with this Court's precedents").[1] Here, the Fourth Circuit's decision appears to conflict with prior decisions from this Court. Pet. at 13-15. Specifically, the new Litigation Bar prevents re-litigation of a claim in a § 2255 petition if the claim was dismissed on direct appeal, even if the dismissal occurred without a ruling on the merits. This new Litigation Bar appears to conflict with myriad cases from this Court holding that the doctrine of collateral estoppel only bars re-litigation of claims previously resolved on the merits. *Id.*

1. *See also United States v. Doe*, 465 U.S. 605, 610 (1984) (certiorari granted "to resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's holding in *Fisher*"); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982) (lower court opinion "appears to be inconsistent with prior decisions of this Court").

(2) The Fourth Circuit's decision in this case conflicts with the approach adopted by the other courts of appeals, which also have required a decision on the merits in order to impose a re-litigation bar like the one imposed by the Fourth Circuit here. Pet. at 16-17. The fact that other courts of appeals have not yet explicitly considered this new Litigation Bar should not sway this Court from granting a writ of certiorari. In *Begier v. Internal Revenue Service*, for example, this Court granted a writ of certiorari to review a decision by the Third Circuit in favor of the Internal Revenue Service, where two other circuits had "resolved against the taxing authorities cases presenting related issues" but where "[n]o other Court of Appeals ha[d] decided a case that presents the precise issue we decide here." 496 US. 53, 57 n.2 (1990). Similarly, in several other cases, this Court has granted a writ of certiorari where the decision of one court of appeals conflicted with the approaches — as opposed to the specific holdings — of other courts of appeals on the same issue. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 300 (1986) (noting grant of certiorari based on "the importance of the case, and the divergent approaches of [four state appellate courts and a federal court of appeals] to the issue."); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005) (certiorari granted "to resolve conflict among the Courts of Appeals over the scope of the *Rooker-Feldman* doctrine").

(3) The Fourth Circuit's new Litigation Bar is important and likely to have serious consequences soon. The great majority of all criminal cases are resolved

through pleas,[2] and one recent study found that two-thirds of all plea agreements contain waivers of review rights. Pet. at 11-12 n. 8. If, as the court of appeals implicitly held, every waiver of a direct appeal right effectively also waives the right to raise a claim in a petition filed under § 2255, criminal defendants who are negotiating plea agreements should be aware of this so that they can make knowing and intelligent decisions about the terms of the plea agreements and the rights they are waiving.

(4) The Fourth Circuit adopted the new Litigation Bar in an exercise of its supervisory power; this case thus requires an exercise of this Court's supervisory power over lower court proceedings. A writ of certiorari is justified because the court of appeals' decision represents a significant departure from the "accepted and usual court of judicial proceedings" on the issue of re-litigation bars. Sup. Ct. R. 10(a).

This Court also should grant a writ of certiorari to decide whether the holdings of *Day v. McDonough*, 547 U.S. 198 (2006), apply to petitions filed under § 2255. As discussed below, this is an important issue on which lower court decisions conflict.

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2. According to the United States Sentencing Commission, in 2008, 96.3% of all federal court criminal cases were resolved by a plea of guilty. In the Fourth Circuit, the figure was 95.7%. *United States Sentencing Commission, Statistical Information Packet, Fourth Circuit* (Fiscal Year 2008) at 3, *available at* http://www.ussc.gov/JUDPACK/2008/4c08.pdf (last accessed November 9, 2009).

Other circumstances justify issuance of a writ of certiorari. For example, the new Litigation Bar was announced for the first time in the panel decision (Pet. App. at 8a-13a), and the court of appeals then applied the new Litigation Bar retroactively to Mr. Linder's case. Pet. at 28-29. This case thus raises the important question of whether a new procedural rule can be applied retroactively to a pending case, to the detriment of a petitioner. *Id.* Moreover, as the Hon. Diana Gribbon Motz noted in the dissent from the court of appeals' denial of rehearing *en banc*, the court of appeals' mistaken decision has had dire consequences to Mr. Linder: "[t]welve years of a man's life ought to trump any imagined tension between dismissal of Linder's direct appeal and a grant of habeas relief to him." Pet. App. at 41a. This Court should grant a writ of certiorari to review these important issues.

II. The Government's Arguments In Opposition Are Without Merit.

1. With respect to the Litigation Bar, the Government's Opposition largely attempts to avoid discussion of the conflicts engendered by this case, by re-casting the court of appeals' decision in unnaturally narrow terms. The Government first argues that the court of appeals' decision does not appear to apply the collateral estoppel doctrine. Opp. at 8. The Opposition's circular reasoning is that because (1) the doctrine of collateral estoppel requires a prior determination on the merits, and (2) there was no prior ruling on the merits, the court of appeals could not have been applying the collateral estoppel doctrine. *Id.* at 8-12. On this point, the Government and Mr. Linder agree: Mr. Linder's

argument is that the court of appeals promulgated and applied a new variation of the collateral estoppel doctrine. While the court of appeals did not specifically use the term "collateral estoppel," it used several other terms that made clear that it was modifying the collateral estoppel doctrine. For example, the court of appeals characterized the Government as arguing that "Linder may not avoid the consequences of his appeal waiver and our prior judgment by ***reviving*** his *Booker* claim in a § 2255 motion." Pet. App. 10a (emphasis added). Then, in its holding, the court of appeals barred Mr. Linder from "***re-raising the same challenge*** in a § 2255 motion." *Id.* at 12a (emphasis added). The use of "reviving" and "re-raising" clearly invokes long-standing doctrine of collateral estoppel, which is concerned with the re-litigation of claims. Moreover, to support its holding, the court of appeals cited a number of decisions that applied the collateral estoppel doctrine. *Id.* at 13a. The natural and reasonable reading of the court of appeals' decision is that this case modifies the long-standing rule on collateral estoppel to prevent "reviving" or "re-raising" of a claim that was previously dismissed on direct appeal, even if there was no prior disposition on the merits.

Second, the Government attempts to re-cast the court of appeals' holding as one limited to waiver. Opp. at 8. This ignores the fact that the court of appeals' decision specifically found that Mr. Linder waived his right to direct appeal but that he did not waive his right to a § 2255 petition. Pet. App. 3a n.1. The court of appeals' decision repeatedly criticizes Mr. Linder's efforts to "reviv[e]" and "re-raise" his claim (Pet. App. at 10a, 12a) and thereby makes clear that its decision is based on a variation of the collateral estoppel doctrine, not waiver.

The balance of the Opposition's arguments are focused on the merits. For instance, in the third argument, the Government contends that absent the court of appeals' decision, Mr. Linder would have been better off than a petitioner who "simply defaults his appeal." Opp. at 10-11. Once again, this overlooks the court of appeals' observation that "a collateral attack is distinct from a direct appeal." Pet. App. 3a n.1. Plea agreements also correctly distinguish between the two: some defendants waive both a right to a direct appeal and a right to a § 2255 petition, while others, like Mr. Linder, only waive the right to a direct appeal while preserving the right to a § 2255 petition. *Id.* Affording Mr. Linder (and others who waive only a direct appeal) a § 2255 challenge thus provides Mr. Linder with no windfall; on the contrary, that approach merely enforces the plain terms of his plea agreement and permits Mr. Linder to exercise his statutory rights. Preserving the court of appeals' decision, however, would bestow a windfall upon the Government by preventing a defendant from filing a § 2255 petition when, as the court of appeals found, he did not waive that right in his plea agreement. Pet. App. at 3a n.1.

Fourth, the Government contends that the court of appeals' decision is correct because a § 2255 petition cannot do "service for an appeal." Opp. at 12. This argument disregards that the plain language of § 2255 specifically provides a vehicle for Mr. Linder's *Booker* challenge:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that

> ***the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law*** . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

See 28 U.S.C.§ 2255(a) (emphasis added). Even if one assumes that Mr. Linder waived the right to bring, in his direct appeal, his claim under *United States v. Booker*, 543 U.S. 220 (2005),[3] the plain language of § 2255 still authorizes Mr. Linder to present that claim on collateral review. Simply put, where, as here, there are two vehicles for a challenge and the Government agrees to a plea agreement in which a defendant only waives the right to use one of those vehicles, then the defendant must be allowed to use the other.

Fifth, the Government contends that because he waived the right to directly appeal his sentence, Mr. Linder should be required to meet "a higher standard than the usual cause-and-prejudice standard for excusing mere procedural default" in order to bring his *Booker* claim in his § 2255 petition. Opp. at 13. This is an unfair argument. Mr. Linder did not default on or waive his right to bring his *Booker* claim in a § 2255 petition, and thus need not demonstrate "cause and prejudice." Moreover, before the court of appeals' decision in this case was issued on January 12, 2009, no

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3. Mr. Linder had, in fact, specifically preserved his right to directly appeal the trial court's sentence. Pet. at 7 n.3.

court had held, as far as diligent research has identified, that dismissal of a claim without reaching the merits would bar "re-raising" that claim in a § 2255 petition. Mr. Linder cannot now be faulted for failing to demonstrate "cause and prejudice."

Sixth, the Government claims that review is unjustified because "[t]his case presents no issue of wide significance." Opp. at 14. However, one character of the reasons considered by the Court in granting a writ of certiorari is that a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." *See* Sup. Ct. R. 10(a). Modification of the collateral estoppel doctrine in the manner adopted in this case is an important matter within this Court's supervisory power such that review is justified. *Id.* In short, the decision of the court of appeals is important because it: (1) modifies the well-established doctrine of collateral estoppel; (2) restricts access to federal collateral relief; (3) implicates this Court's supervisory power; (4) will affect thousands of defendants who resolve their cases through plea agreements that contain appeal waivers but not § 2255 waivers; and (5) applies the new Litigation Bar retroactively to Mr. Linder, contrary to *Thomas v. Arn*, 474 U.S. 140, 145 (1980).[4] These are important matters applicable not only in the Fourth Circuit, but in all courts of appeals.

4. *See* Pet. at 28-29.

2. This Court also should grant a writ of certiorari to decide whether *Day v. McDonough*, 547 U.S. 198 (2006), applies to § 2255 petitions.

In response, the Government first asserts that there is no "division of authority in the court of appeals" on this issue such that a writ of certiorari is justified. However, in a number of cases, this Court has noted that a grant was justified based on the importance of the issue presented and, for example, "conflicting views in the courts of appeals and the district courts." *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964). For instance, in *St. Martin Evangelical Lutheran Church v. South Dakota*, the Court cited but one federal district court decision, in addition to the decision of the Supreme Court of South Dakota, as contrary to seven state court rulings and one court of appeals decision, in support of the statement that certiorari was granted because of "the growing number of conflicting federal and state decisions on [a federal statutory] issue." 451 U.S. 772, 780 & n.10 (1981). Similarly, in *Heffron v. International Society for Krishna Consciousness*, this Court cited, among other things, four conflicting district court rulings. 452 U.S. 640, 646 & n.9 (1981). And, in granting certiorari in *Gulf Offshore Co. v. Mobil Oil Corp.* this Court identified the conflict as involving three state courts and two federal district courts. 453 U.S. 473, 477 & n.3 (1981).[5] Here, three lower court decisions, including two from courts of appeals

5. *See also Murphy Bros. v. Michette Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999) (certiorari granted due to disagreement in "lower courts," citing conflict among three federal appellate courts and two federal district courts); *Massachusetts v. United States*, 435 U.S. 444, 453 (1978) (granting certiorari based solely on a conflict between a court of appeals decision and a single district court ruling, and noting two district court decisions).

and one from a district court, have stated that *Day* does not apply to § 2255 petitions, while two district court cases have applied *Day* 's holdings to § 2255 petitions. Pet. at 20-21. Given the importance of this issue and the conflict in lower court opinions, this Court should issue a writ of certiorari to resolve the matter.

Second, the Government asserts that this case does not present the *Day* issue. In this regard, the Government reads *Day* too narrowly. The facts in *Day* involved a district court *sua sponte* raising a statute of limitations defense in the face of a concession by a State that the § 2254 petition was timely. However, *Day* held, among other things, that a district court must apply a three-step test before exercising its discretion to recognize a defense waived by a State. Pet. at 20. *Day* is thus fundamentally about limiting the discretion of the federal courts to raise a waived defense.

Here, the court of appeals clearly did not apply *Day*, relying instead on an *ad hoc* collection of facts to excuse the Government's waiver of the Litigation Bar. As Judge Motz noted in dissent from the court of appeals' denial of rehearing *en banc*, the result is a decision that appears to set different rules for the Government than habeas petitioners:

> When habeas *petitioners* have sought to advance such defaulted arguments, this court has steadfastly refused to consider them. Allowing the Government to prevail on an argument that it defaulted seems to me the antithesis of the equal justice under law guaranteed by our Constitution.

Pet. App. at 29a (emphasis in the original).

This case thus presents an ideal vehicle for this Court to decide whether *Day*'s holdings apply in the § 2255 context.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JUSTIN S. ANTONIPILLAI
Counsel of Record
VICTOR A. RORTVEDT
ARNOLD & PORTER, LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

Attorneys for Petitioner